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IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

9 MICROSOFT CORPORATION,

10 Plaintiff,

11 vs.

12 MOTOROLA, INC., et al.,

13 Defendants.

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MOTOROLA MOBILITY LLC, et al.,

15 Plaintiffs,

16 vs.

17 MICROSOFT CORPORATION,

18 Defendants.

Case No. C10-1823-JLR

MICROSOFT'S MOTION TO SEAL RE  
ITS MOTION FOR PARTIAL  
SUMMARY JUDGMENT

19 **NOTED FOR:**  
20 **Friday, July 19, 2013**

21 **I. RELIEF REQUESTED**

22 Pursuant to Local Civil Rule 5(g) and paragraphs 2(a) and 8 of the protective order  
23 entered in this case, Microsoft respectfully seeks leave to file under seal the following  
24 documents:

- 25 (1) Exhibits 1-3, 5-7, 9-12 to the Declaration of Christopher Wion in Support of  
Microsoft's Motion for Partial Summary Judgment of Breach of Contract and  
Summary Judgment on Motorola's Third, Fourth, Fifth, Seventh, Eighth, and

MICROSOFT'S MOTION TO SEAL RE ITS  
MOTION FOR SUMMARY JUDGMENT - 1

No. C10-1823

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1 Ninth Affirmative Defenses and Second Counterclaim (“Wion Summary  
 2 Judgment Declaration”); and

- 3 (2) Microsoft’s Motion for Partial Summary Judgment of Breach of Contract and  
 4 Summary Judgment on Motorola’s Third, Fourth, Fifth, Seventh, Eighth, and  
 5 Ninth Affirmative Defenses and Second Counterclaim (“Microsoft’s Summary  
 6 Judgment Motion”), to the extent it refers to or describes the sealed exhibits to  
 7 the Wion Summary Judgment Declaration listed above.

8 Microsoft seeks to file the foregoing materials under seal because they contain  
 9 information that has been identified by Microsoft, Motorola, and/or third parties as confidential  
 10 business information under the terms of the protective order issued in this case.

11 Specifically, Microsoft is filing a public version of Exhibit 6 to the Wion Summary  
 12 Judgment Declaration (the Opening Report of Motorola’s expert, Gregory Leonard) that  
 13 redacts three paragraphs disclosing Microsoft’s confidential licensing practices. Microsoft’s  
 14 interest in maintaining the confidentiality of these practices sharply outweighs any public  
 15 interest in their discovery. Microsoft would be exposed to a significant risk of competitive  
 16 harm if they were disclosed to third parties.

17 With the exception of the limited redactions to Exhibit 6 referenced above (and further  
 18 described below), limited additional redactions to Exhibit 6 requested by Motorola, and  
 19 redactions to Exhibit 5 requested by Motorola, all other exhibits at issue on this motion are  
 20 being filed under seal in their entirety, at Motorola’s request.

21 Microsoft is publicly filing a version of its Motion for Summary Judgment that redacts  
 22 references to, and descriptions of, confidential portions of the referenced exhibits identified by  
 23 the parties.

24 For these reasons, Microsoft respectfully requests permission to file the above-  
 25 referenced documents under seal and that the Court direct such documents to remain under  
 seal.

## II. LCR 5(g)(3)(A) CERTIFICATION

The parties met and conferred on July 3, 2013 in an effort to minimize the amount of material to be filed under seal in connection with this motion. As a result, the parties were able to reduce both the number of documents to be redacted (or sealed in their entirety) as well as the scope of the proposed redactions.

### III. FACTS & AUTHORITY

**A. The Operative Protective Order and Applicable Court Rules Permit Microsoft to File Confidential Information under Seal.**

Pursuant to the Protective Order issued by the Court on July 21, 2011, as amended by Order dated October 3, 2012, Microsoft is permitted to file materials designated by either party as Confidential Business Information<sup>1</sup> under seal, with such documents to remain under seal upon Court approval. Paragraphs 2(a) and 8 of the Protective Order govern the filing of documents under seal. Paragraph 2(a) provides:

Any information submitted in pre-trial discovery or in a pleading, motion, or response to a motion in this action, either voluntarily or pursuant to order, and which is asserted by a supplier to contain or constitute Confidential Business Information shall be so designated by such supplier in writing...and shall be segregated from other information being submitted. Documents shall be clearly and prominently marked on their face with the legend: “[SUPPLIER’S NAME] CONFIDENTIAL BUSINESS INFORMATION, SUBJECT TO PROTECTIVE ORDER” or a comparable notice. During the pre-trial phase of this action, such information, whether submitted in writing or in oral testimony, shall be disclosed only *in camera* before the Court and shall be filed only under seal, pursuant to Rule 5(g) of the Local Civil Rules of the United States District Court for the Western District of Washington.

Paragraph 8 likewise provides that:

<sup>1</sup> “Confidential Business Information” is defined in the parties’ Protective Order as “information which has not been made public and which concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the production, sales, shipments, purchases, transfers, identification of customers, inventories, amounts or source of any income, profits, losses, or expenditures.” Protective Order Regarding the Disclosure and Use of Discovery Materials (ECF No. 72), ¶1 (amended by Order dated October 3, 2012 (ECF No. 447)).

1 Any Confidential Business Information submitted to the Court in connection  
 2 with a motion or other proceeding within the purview of this action shall be  
 3 submitted under seal pursuant to paragraph 2 above.

4 *Id.*, at ¶ 8.

5 The Federal Rules of Civil Procedure recognize that courts may permit parties to file  
 6 “trade secrets or other confidential research, development, or commercial information” under  
 7 seal. Rule 26(c)(1)(G) and (H). District courts “are in the best position to weigh the fairly  
 8 competing needs and interests of the parties affected by discovery,” in crafting the appropriate  
 9 treatment of documents for which protected treatment is requested. *Seattle Times Co. v.*  
 10 *Rhinehart*, 467 U.S. 20, 36, 104 S. Ct. 2199 (1984); *see also Phillips v. General Motors Corp.*,  
 11 307 F.3d 1206, 1211-1212 (9<sup>th</sup> Cir. 2002).

12 A party seeking to seal a judicial record attached to a dispositive motion must articulate  
 13 “compelling reasons” that outweigh the public policies favoring disclosure. *Kamakana v. City*  
 14 *and Cnty. Of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006). This presumption may be  
 15 overcome only on a compelling showing that the public’s right of access is outweighed by the  
 16 interests of the public and the parties in protecting the court’s files from public review.  
 17 However, “the public interest in understanding the judicial system would appear to be less  
 18 where ... the documents in question are irrelevant to the Court’s decision.” *Network Appliance,*  
 19 *Inc. v. Sun Microsystems Inc.*, 2010 WL 841274, at \*2 (N.D. Cal. Mar. 10, 2010) (citing  
 20 *Kamakana*, 447 F.3d at 1179) (documents supporting dispositive motion “[not] bearing on the  
 21 resolution of the dispute on the merits ... are therefore more akin to the ‘unrelated,’ non-  
 22 dispositive motion documents the Ninth Circuit contemplated in *Kamakana*”).

23 “In general, ‘compelling reasons’ ... exist when such ‘court files might have become a  
 24 vehicle for improper purposes,’ such as the use of records to ... release trade secrets.”  
 25 *Kamakana*, 447 F.3d at 1179 (citing *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598  
 (1978)). The Ninth Circuit has adopted the Restatement’s definition of “trade secret.” *See*

1      *Ultimate Timing, L.L.C. v. Simms*, 2010 WL 786021, at \*1-2 (W.D. Wash. Mar. 4, 2010)  
 2 (citing *Clark v. Bunker*, 453 F.2d 1006, 1009 (9th Cir. 1972)). Under that standard, a “trade  
 3 secret may consist of any formula, pattern, device or compilation of information which is used  
 4 in one’s business, and which gives him an opportunity to obtain an advantage over competitors  
 5 who do not know or use it.” *Id.*, 2010 WL 786021, at \*2 (quotations omitted).

6      **B. Compelling Reasons Exist to Grant Microsoft’s Motion.**

7      1. Paragraphs 67, 74, and 77 of Exhibit 6 to the Wion Summary Judgment Declaration  
 8      (Mr. Leonard’s Opening Report) Should Remain Redacted.

9      Microsoft requests that the Court maintain under seal the redactions to paragraphs 67,  
 10     74, and 77 of the Leonard Opening Report, attached to the Wion Summary Judgment  
 11     Declaration as Exhibit 6. These paragraphs discuss Microsoft’s confidential licensing  
 12     practices. Microsoft has a significant interest in maintaining the confidential nature of its  
 13     licensing strategies and practices that outweighs any potential interest the public may have in  
 14     accessing this information. Microsoft could suffer significant harm in its future licensing  
 15     negotiations and in managing its licensing business if this information were publicly disclosed.

16      Further, the redacted paragraphs are unrelated to the portions of Exhibit 6 on which  
 17     Microsoft relies in support of Motion for Summary Judgment, and are unlikely to play any role  
 18     in the Court’s consideration of the merits of Microsoft’s motion. The public’s interest in  
 19     understanding the judicial system will not be significantly furthered by providing access to  
 20     these paragraphs. For these reasons, paragraphs 67, 74, and 77 of the Leonard Report should  
 21     remain under seal.

23      2. Exhibits 1-3, 5-7, and 9-11 to the Wion Summary Judgment Declaration.

24      Motorola has requested that Microsoft file Exhibits 1-3, 7, and 9-11 to the Wion  
 25     Summary Judgment Declaration under seal.

1 Motorola also has requested that Microsoft redact material appearing on pages 70-72,  
2 155, 191-92 of Mr. Leonard's deposition transcript (Exhibit 5), along with paragraphs 17, 66,  
3 and 70-71 of Mr. Leonard's opening expert report (Exhibit 6). Pursuant to the Parties'  
4 Stipulated Protective Order and this Court's local rules, Microsoft is filing unredacted versions  
5 of these documents under seal. Accordingly, while only Motorola confidential information is  
6 being redacted from the public version of Exhibit 5, confidential information of *both* parties is  
7 being redacted from the public version of Exhibit 6.

8 Microsoft takes no position at this time with respect to the propriety of Motorola's  
9 requests as to these documents.

## IV. CONCLUSION

11 For the reasons set forth herein, Microsoft respectfully requests that the Court grant its  
12 motion. A [Proposed] Order Granting Microsoft's Motion to Seal re its Motion for Partial  
13 Summary Judgment has been submitted herewith.<sup>2</sup>

14 DATED this 3rd day of July, 2013.

**RESPECTFULLY SUBMITTED,**  
**CALFO HARRIGAN LEYH & EAKES LLP**

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<sup>25</sup> <sup>2</sup> Nothing herein is intended as a waiver of Microsoft's right to contest Motorola's designation of material as Confidential Business Information in accordance with the terms of the Protective Order. Microsoft expressly reserves the right to do so as the circumstances warrant.

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## **CERTIFICATE OF SERVICE**

I, Tim Murphy, swear under penalty of perjury under the laws of the State of Washington to the following:

1. I am over the age of 21 and not a party to this action.
  2. On the 3rd day of July, 2013, I caused the preceding document to be served on counsel of record in the following manner:

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MICROSOFT'S MOTION TO SEAL RE ITS  
MOTION FOR SUMMARY JUDGMENT - 9

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DATED this 3rd day of July, 2013.

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